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BAR COUNCIL v. ONG KEH KEONG

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
AZMI ARIFFIN JCA
AHMAD KAMAL MD SHAHID JCA
B [CIVIL APPEAL NO: W-02(A)-582-04-2023]
3 JANUARY 2025

Abstract – *Under r. 19 of the Legal Profession (Disciplinary Proceedings) Rules 2017, it is a mandatory requirement that the Disciplinary Committee ('DC') shall compile a complete record of proceedings, consisting of all evidence tendered and submit the record of proceedings together with its report to the Disciplinary Board ('DB'). In the case at hand, the failure of the DC to include the omitted documents in its report to the DB, which were relevant and important to the defence, raised the question of whether the DB had the benefit of a full picture of the nature of the said defence in arriving at its decision. Such failure rendered the DC's report invalid and a nullity.*

LEGAL PROFESSION: *Disciplinary Committee – Report – Complaints against advocate and solicitor – Omission of certain documents in Disciplinary Committee's ('DC') report to Disciplinary Board ('DB') – Omitted documents relevant and important to advocate and solicitor's defence – Whether failure of DC to submit complete report to DB compromised decision-making process of DB – Whether DB had benefit of full picture of nature of defence in arriving at decision – Whether DC's report invalid and nullity – Whether there was procedural unfairness and non-compliance – Legal Profession (Disciplinary Proceedings) Rules 2017, rr. 18(12) & 19*

The respondent was a practising advocate and solicitor. Four individuals, who were qualified persons under the Legal Profession Act 1976 ('LPA'), had applied to the respondent's firm, to undergo and complete their pupillage period and, thereafter, be admitted to the Malaysian Bar. The respondent issued separate letters of appointment to the individuals, which contained a term that '... the firm reserves the right to compensation from you for breach of this letter of appointment'. The impugned term in the letters of appointment, which the appellant took umbrage with, was 'Your pupillage may be terminated by either party serving the other, two months' notice of such intention or paying two months' allowance *in lieu* of notice'. The appellant wrote to the respondent, stating that: (i) they were informed that the respondent had demanded payment of two months' salary *in lieu* of two months' notice from the individuals and had proceeded with civil claims against two of them; and (ii) pupillage was not to be equated with 'employment' and such onerous and unfair terms in the letters of

appointment were acts that may be in breach of s. 94(3)(o) of the LPA. As there was no response from the respondent, the appellant lodged a complaint against the respondent with the Disciplinary Board ('DB'). A Disciplinary Committee ('DC') was convened and, at the conclusion of the hearing of the complaint, the DC recommended the following: (i) restitution – that the individuals be repaid the full sum claimed and paid by them to the respondent; and (ii) a fine of RM5,000 be paid by the respondent. The DB rejected the DC's recommendation on restitution and affirmed the DC's recommendation on the imposition of fine. Aggrieved, the respondent appealed against the DB's order, at the High Court. The High Court allowed the appeal on the grounds that: (i) all documentary evidence tendered before the DC, pursuant to r. 19 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ('Rules'), must be part of the report to the DB; and (ii) there was non-compliance of r. 19 of the Rules as the DC failed to include certain documents, which were relevant and important to the respondent's defence, in its report to the DB. Hence, the present appeal.

Held (dismissing appeal; affirming decision of High Court)
Per Ahmad Kamal Md Shahid JCA delivering the judgment of the court:

(1) The word 'shall' in rr. 18(12) and 19 of the Rules, denotes that it was a mandatory requirement for the DC to: (i) make a record of the evidence given to it; and (ii) compile a record of proceedings consisting of all evidence, including documentary evidence tendered, and submit the record of proceedings together with its report to the DB. The omitted documents were relevant and important to the respondent's defence. If the omitted documents were not included in the DC's report, then these documents may not have been considered by the DC and certainly would not have been considered by the DB. This raised the question of whether the DB had the benefit of a full picture of the nature of the respondent's defence before arriving at its decision. There was no explanation proffered by the DB and/or the appellant on the omitted documents from the DC's report. The failure of the DC to submit a complete report to the DB had, therefore, compromised the decision-making process of the DB and rendered the DC's report invalid and a nullity. In view of the non-compliance with rr. 18(12) and 19 of the Rules, there was procedural unfairness in the procedure before the DB. (paras 26-27, 29-30 & 42-44)

Case(s) referred to:
Chou Ka Ping v. Liow Ah Chiew [2013] MLRHU 1165 ***(refd)***
Majlis Peguam Malaysia v. Chou Ka Ping [2015] 3 CLJ 28 CA ***(refd)***
Ramanathan Velu v. Jeganathan S Periasamy & Anor; Majlis Peguam Malaysia (Intervener) [2016] CLJU 304; [2016] 1 LNS 304 CA ***(refd)***
Ramasamy Amaippan v. Kwan Lee Pin; Majlis Peguam Malaysia (Intervener) [2018] 3 CLJ 336 CA ***(refd)***

Legislation referred to:
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 24
Legal Profession (Disciplinary Proceedings) Rules 2017, rr. 18(12), 19
Legal Profession Act 1976, ss. 12(1), (2), 94(3)(k), (o), 103E

For the appellant - Lai Chee Hoe, Angeline Ang Mei Fong & Deyvinah Ganesalingam; M/s Chee Hoe & Assocs
For the respondent - Ong Keh Keong; M/s Ong Partnership

[Editor's note: For the High Court judgment, please see Ong Keh Keong v. Bar Council [2023] CLJU 1278; [2023] 1 LNS 1278 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] This is an appeal against the judgment of the learned High Court Judge (HCJ) dated 22 March 2023, allowing the respondent's, Mr Ong Keh Keong's (OKK) appeal in setting aside the Disciplinary Board's (DB) order issued by the appellant, (the Bar Council) dated 18 January 2020 which imposed a fine of RM5,000 on OKK.

[2] Having heard the appeal, examined the appeal records and considered the submissions by parties, we unanimously decided to affirm the decision of the learned HCJ and therefore, dismiss the appeal, for the reasons which are set out herein.

Background Facts

[3] OKK is a practising advocate and solicitor. On 15 March 2017, the Bar Council issued a letter to OKK concerning complaints made by a few individuals against OKK (the letter).

[4] The individuals are Nurhani binti Mohammad Shukri (Nurhani), Vishnu Shan (Vishnu), Wan Hilmi Wan Hamdi (Hilmi) and Sharifah Dyana Baizura binti Syed Azmi Ahmad (Sharifah). (Collectively referred to as the individuals).

[5] The individuals, who were qualified persons under the Legal Profession Act 1976 (LPA), applied to OKK's firm, Messrs Ong Partnership, to undergo and complete their pupillage period and thereafter be admitted to the Malaysian Bar.

[6] OKK issued separate letters of appointment to the said individuals, which contain similar terms and conditions. They were duly agreed upon and acknowledged by the said individuals. One of the terms of the letter of appointment states that:

> In addition, the Firm reserves the right to compensation from you for breach of this letter of appointment.

[7] The impugned term in the letter of appointment, which the Bar Council took umbrage with, is:

> Your pupillage may be terminated by either party serving the other, two (2) month's notice of such intention or paying two (2) month's allowance *in lieu* of notice.

[8] In the said letter to OKK, the Bar Council said that they were informed that OKK had demanded payment of two months' salary *in lieu* of two months' notice from the individuals. OKK had also proceeded with civil claims against Vishnu and Hilmi.

[9] The Bar Council took the position that the terms and conditions imposed by OKK in the letter issued to the individuals to enable them to undergo the pupillage were prejudicial to the rights of the individuals.

[10] After having referred to s. 12(1) and (2) of the LPA, the Bar Council informed OKK that it was of the view that pupillage is not to be equated with "employment". The Bar Council then proceeded to state:

> Such onerous and unfair terms in the letter of appointments are acts that may be in breach of s. 94(3)(o) of the Legal Profession Act 1976.

[11] There was no response from OKK arising from the said letter.

The Complaint

[12] On 9 January 2018, the Bar Council issued a letter of complaint to the Director of the DB. The letter of complaint reiterated the factual background as contained in the letter to OKK dated 15 March 2017. It concluded that the Bar Council was of the view that OKK might be guilty of:

(i) section 94(3)(k) of the LPA, specially r. 14.01(2) of the Rules and Rulings of the Bar Council due to failure to reply to the Bar Council's letter dated 15 March 2017; and

(ii) section 94(3)(o) of the LPA for imposing terms of contract upon OKK's pupil(s) in serving their pupillage.

[13] On 15 October 2018, a Disciplinary Committee (DC), chaired by Mr Jacob Rabindranath, was appointed to investigate the complaint. At the conclusion of the hearing of the complaint on 28 December 2018, where OKK was present and testified, the DC made the following finding:

> The committee is unanimous in its findings that the respondent has breached both the complaints as stated therein. The respondent was questioned vigorously by the committee, and was unable to provide a reasonable and/or plausible explanation for his actions. The DC believes the gravity of the respondent's actions has tarnished the BC, and corollary

A the punity ought to be exemplary. Accordingly, the DC recommends (a) restitution – that the pupils be repaid the full sum claimed and paid the [by] pupils to the respondent, and (b) fine – a fine of RM5000.00 be paid by the respondent.

[14] The DB convened a meeting on 18 January 2020 to consider the B finding of the DC report. The finding of the DC was affirmed in the following manner (the DB's order):

In the exercise of the powers conferred by Section 103D of the Legal Profession Act 1976 (the Act), the Disciplinary Board having on 18 January 2020 considered the report made by the Disciplinary C Committee on the complaint against the Respondent, affirmed the Disciplinary Committee's finding of liability and recommendation on punishment but rejected the recommendation on punishment for restitution, instead IT IS HEREBY ORDERED that the Respondent do pay a fine of Ringgit Malaysia Five Thousand (RM5,000.00) only payable to the Discipline Fund within one (1) month from the date of this Order D AND IN DEFAULT THEREOF Section 103(1) of the Act shall apply.

In The High Court

[15] Aggrieved, OKK filed an appeal *vide* under s. 103E of the LPA by way of originating summons (OS). In this OS, OKK sought to set aside the DB E order. The grounds of the application, as stated in the OS, can be summarised as follows:

(i) in arriving at its finding, the DC and DB had ignored the ruling made by the Magistrates' Court Kuala Lumpur *vide* Summons No. A72NCVC-4315-09-2015 that the letter of appointment did not constitute a contract F of employment. In that case, the Magistrates' Court had allowed OKK's claim against Vishnu for the sum of RM3,600 being two months' salary *in lieu* of notice.

(ii) the DC and DB had erred in their respective ruling in holding that the two months' notice requirement was in contravention of the LPA.

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(iii) the DC and DB had erred in imposing the RM5,000 fine against OKK, which was disproportionate to the nature of the complaint.

[16] OKK submitted that there was a breach of the principles of natural justice in the conduct of the complaint against him. According to OKK in H para. 4 of his supplementary affidavit, when he received that record of the inquiry from the DC, he discovered that there were various documents not included in the DC report, namely, his statement of defence, bundle of documents, witnesses statements and witness statement of Nurhani (omitted documents).

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[17] OKK submitted that without the omitted documents, the DB could not have been said to have directed its mind when considering the DC's report.

[18] In short, OKK contended that the failure of the DC to compile and submit a complete report would render the DC report invalid and therefore a nullity.

[19] On 22 March 2023, the learned HCJ allowed the OS and ordered the findings of the DC and DB to be set aside with no order as to costs.

Findings Of The Learned High Court Judge

[20] The learned HCJ found, among others:

(i) all the documentary evidence tendered before the DC per r. 19 of the Legal Profession (Disciplinary Proceedings) Rules 2017 (the 2017 Rules) including the omitted documents, must be part of the report to the DB. The High Court rejected the Bar Council's contention that the omitted documents are not legally required to be included in the DC report.

(ii) the failure of the DC to include the omitted documents in its report to the DB raised the question of whether the DB had the benefit of a full picture of the nature of OKK's defence in arriving at its decision.

(iii) for the reasons aforesaid, there was non-compliance with the mandatory requirement of r. 19 of the 2017 Rules. The failure compromised the decision-making process of the DB. This failure amounted to an error of law leading to a decision, as in *Ramasamy Amaippan v. Kwan Lee Pin; Majlis Peguam Malaysia (Intervener)* [2018] 3 CLJ 336; [2018] 6 MLJ 528; [2017] MLRAU 232; [2017] 4 AMR 621, untenable in law.

(iv) such error on the part of the DC and DB warranted an appellate intervention.

(v) thus, the OS is allowed to the extent that the findings of the DC and DB are hereby set aside. There shall be no order as to costs.

[21] Dissatisfied with the decision, the Bar Council now appeals to the Court of Appeal.

The Appeal

[22] The issues present before this Honourable Court are as follows:

(i) whether the learned HCJ had erred in law for setting aside the DB order dated 18 January 2020 solely on a technical basis, *ie*, that the DC report furnished to the respondent was incomplete;

(ii) whether the learned HCJ did not consider the merits of the DB order in relation to the respondent's conduct as an advocate and solicitor, and whether the DB order was rightfully made against the respondent;

A (iii) whether the learned HCJ failed to appreciate the role of the court in relation to orders, findings and decisions made by the DB;

(iv) whether the learned HCJ had erred in law in relation to the scope of the LPA in imposing fines on an advocate and solicitor;

B (v) whether the learned HCJ had erred in law in holding that the respondent's fundamental rights had been infringed/breached;

(vi) whether the learned HCJ has misapplied the principles in the case of *Chou Ka Ping v. Liow Ah Chiew* [2013] MLRHU 1165 and the case of *Ramasamy* (*supra*); and

C (vii) whether the learned HCJ had erred in law in holding that the DB order could not be held up in law and thus, should be set aside.

Our Findings

[23] OKK complained that the DC had not complied with r. 18(12) and D r. 19 of the 2017 Rules in that several pieces of documents submitted by OKK were not recorded in the DC report which was prepared after the disciplinary hearing was conducted on 6 December 2018.

[24] The learned HCJ in hearing the appeal agreed with OKK's submission and held that the Bar Council had indeed breached r. 18(12) and r. 19 of the E 2017 Rules and ordered that the DB order to be set aside.

[25] For ease of reference, the provisions of r. 18(12) and r. 19 of the 2017 Rules are reproduced below:

Proceedings of the Disciplinary Committee

F 18. (12) *The Disciplinary Committee shall make a record of the evidence given to it.*

Record of proceedings before Disciplinary Committee

19. The Disciplinary Committee *shall compile a record of proceedings consisting of all evidence including documentary evidence tendered and shall submit the record of the proceedings together with its report under rule 21 to the Disciplinary Board.* (emphasis added)

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[26] Having read the above provisions, we are of the view, that the word "shall" denotes that this is a mandatory requirement for the DC:

H (i) to make a record of the evidence given to it; and

(ii) compile a record of proceedings consisting of all evidence including documentary evidence tendered and submit the record of proceedings together with its report to the DB.

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[27] We are of the considered view that the omitted documents are relevant and important to OKK's defence. If the omitted documents were not included in the DC's report, then these documents may not have been considered by the DC and certainly would not have been considered by the DB.

[28] It is quite clear and we so find that the omitted documents were never put before nor considered by the DB when arriving in its finding of liability against OKK as the DB was only provided with the incomplete DC report which contained material omissions.

[29] There was no explanation proffered by the DB and/or the Bar Council on the omitted documents from the DC report which we find are important to OKK's defence.

[30] Therefore, we are of the view that the failure of the DC to submit a complete report to the DB had compromised the decision-making process of the DB.

[31] Our attention has been drawn to the case of *Ramasamy* (*supra*). In that case, the Court of Appeal had the opportunity of interpreting r. 24 of the former Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (the 1994 Rules). The 1994 Rules are now replaced by the 2017 Rules. It is to be noted that r. 24 of the 1994 Rules is in *pari materia* with r. 18(12) of the 2017 Rules.

[32] The Court of Appeal held that strict compliance of r. 24 of the 1994 Rules, which is in *pari materia* with r. 18(12) of the 2017 Rules is required.

[33] The Court of Appeal, speaking through Justice Abang Iskandar Abang Hashim (as the learned PCA then was), held as follows:

> [29] *Strict compliance of Rule 24 is required.* The DC is not a final arbiter of the dispute created by the lodging of the complaint. It investigates the allegation by hearing witnesses acquainted with the complaint lodged and at the end of that exercise it recommends actions to be taken against the errant advocate and solicitor, depending on the outcome of the investigation. *Whatever its decision at the end of the investigation upon which its recommendations to the DB are premised, the DC must act on the evidence given by the various witnesses. Therefore, it is imperative that it keeps a proper record of what had transpired before it in terms of the testimonies of the witnesses.* The DC's recommendations are subject to review by the DB who will definitely be interested to see the evidence of witnesses in cases where it may not agree with the recommendations made by the DC. The High Court may also want to see how the decisions are arrived at by the DB. *It will be extremely difficult to verify the challenges made by the aggrieved parties pertaining to what had transpired at the DC hearing when there is insufficient record of the proceedings to substantially reflect what had transpired during the DC proceedings, before the review or appeal tribunal.*

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> [30] ... *The significance of complying with r. 24 cannot be overstated. Hence, the mandatory dictate in which r. 24 has been couched in its choice of language that was employed therein.* There is much wisdom underlying that provision. The perils that may ensue, as a result of its non-compliance, in our considered view, have been clearly amplified in this appeal before us.

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> [31] *We found that there was non-compliance of r. 24 and that it has thereby compromised the decision-making process of the DC.* The failure of the learned High Court Judge to deal with this crucial issue in her Grounds of Judgment amounted to an error of law leading to a decision which in our respectful view, is untenable. That must require our appellate intervention. (emphasis added)

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[34] Further, we were referred to the case of *Ramanathan Velu v. Jeganathan S Periasamy & Anor; Majlis Peguam Malaysia (Intervener)* [2016] CLJU 304; [2016] 1 LNS 304; [2016] 4 MLRA 427, where the Court of Appeal held as follows:

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> [8] In the instant case, we found substantial non-compliance of the rules by the DC and the subsequent enhancement of punishment by the DB **without the benefit of statutorily required documents under the rules had, in our view, compromised the integrity of the decision-making process.** (emphasis added)

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[35] We were then referred to the judgment of the High Court in *Chou Ka Ping* (*supra*), where the High Court held that the failure of the DC to record evidence and proceedings was an error of law in the decision-making process by the DC. The failure rendered the report of the DC to the DB a nullity. In the circumstances of the case, the order of the DB based on the DC's report was accordingly nullified and invalidated.

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[36] The High Court held as follows:

> [22] ... *Failure by the DC to record evidence and proceedings was, thus, an error of law in the decision making process by the DC. It rendered the report of the DC to the DB a nullity and thereby, the order of the DB based on the DC's report was on this ground too, accordingly, nullified and invalidated.* (emphasis added)

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[37] The Bar Council, aggrieved by the decision of the High Court, appealed to the Court of Appeal. In dismissing the appeal and affirming the High Court's decision, the Court of Appeal in *Majlis Peguam Malaysia v. Chou Ka Ping* [2015] 3 CLJ 28; [2015] 3 MLRA 21 refused to remit the matter to be heard by another properly constituted DC.

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[38] From the above cases, it is trite that a failure to record the notes of proceedings is fatal. In our instant appeal, we find that the entire defence adduced by OKK being the omitted documents were inexplicably left out in the DC report.

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[39] Given the above, we are of the considered view that it is a mandatory requirement under r. 19 that the DC shall compile a complete record of proceedings consisting of all evidence tendered and submit the record of proceedings together with its report to the DB.

[40] With respect, we cannot agree with the Bar Council's contention that the omitted documents are not legally required to be included in the DC report.

[41] It is our considered view that all evidence, referred to in r. 19 of the 2017 Rules which necessarily includes the omitted documents must be part of the report which is to be compiled by the DC and transmitted to the DB.

[42] We are in agreement with the learned HCJs findings that the failure of the DC to include the omitted documents in its report to the DB raised the question of whether the DB had the benefit of a full picture of the nature of the OKK's defence in arriving at its decision.

[43] Hence, we view that the failure of the DC to submit a complete report, *ie*, by not including the omitted documents in the DC report to the DB, rendered the DC report as invalid and a nullity.

Conclusion

[44] Based on the aforesaid reasons, in view of the non-compliance with r. 18(12) and r. 19 of the 2017 Rules, we are of the considered view that there was procedural unfairness in the procedure before the DB.

[45] We find no error or misdirection on the part of the learned HCJ in allowing the appeal and setting aside the DB order.

[46] In the result, we see no reason to interfere with the findings of the learned HCJ. As such, we find no merit in the appeal. We unanimously decided to affirm the decision of the High Court and therefore dismissed the appeal. We made no order as to costs.